IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

ROBERT GONZALES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ROBERT GONZALES, your petitioner, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the above case pending in that Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as yet unreported, appears at Appendix A, infra. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the Honorable WARREN FEGUSON, trial judge, of the United States District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 6, 1972. A Petition for Rehearing was filed on June 16, 1972. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Further jurisdictional requisites are set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND FEDERAL QUESTIONS PRESENTED

(A) Whether or not the doctrine of concurrent sentences should be invoked when the penalty under each of the concurrent sentences may have an adverse effect upon the petitioner.

(B) Whether the trial court may find petitioner guilty and sentence petitioner to prison on two counts (conspiracy to distribute heroin

and distribution of the same heroin) arising out of the same transaction.

(C) May contraband seized inside the subject premises, when petitioner is arrested outside, be introduced into evidence. (Fourth Amendment.)

(D) Is petitioner entitled to discover the identity and whereabouts of an informant who may give testimony about a possible entrapment of petitioner by a governmental agent.

STATEMENT OF THE CASE

Following a waiver of a jury trial by defendant Gonzales, the case was tried without a jury before the Honorable Warren J. Ferguson. On October 21, 1971, the Court found the defendant guilty on Counts I, VI through X and not guilty on Counts II through V and XI.

On November 15, 1971, the Court sentenced the defendant to eight (8) years on each of Counts I and VI through X to begin and run concurrently with each other.

Following an introduction to co-defendant Martinez, undercover officer Perry entered a series of purchases of heroin. The government refused to allow the informant's name or identity to be divulged. At the time of petitioner Gonzales' arrest, a quantity of heroin was found inside the premises where he had previously been.

Deputy Sheriff Robert Perry testified:

The witness saw co-defendant Martinez on July 21, 1971. He went with him to Walnut Avenue in Los Nietos. He spoke with a voice on the telephone who he now knows to be defendant Gonzales. Martinez and Gonzales exited the residence and Martinez had in his possession a wax bag (heroin)..

On July 27, 1971, the witness testified he purchased heroin from Martinez and Gonzales.

On August 4, 1971, the witness testified he purchased heroin from Martinez and Gonzales. After the purchase, the witness exited from the front door of the address, made prearranged signals to the surveilling officers, and proceeded back in the direction of the house with currency in his hand. Upon reaching half way back to the location, Gonzales was seen standing in the doorway.

Although the witness stated that he entered the location and effected the arrest of Gonzales within the location, the place of Gonzales' arrest was subsequently clarified as being outside of the premises.

Deputy Sheriff Clark testified that he arrested Gonzales outside of the house and then was taken back into the same door that he had come out of. There was then a search of the premises and contraband (Exhibit 5a at the trial) was located inside of the premises. Contraband found inside of the house forms the basis

for the conviction in Count X. There was a stipulation that Exhibit 5a was found to be a substance which contained a usable quantity of heroin and that the substance totalled approximately 267.6 grams. There was an objection to the introduction of Exhibit 5a, forming the basis of Count X. The evidence was received over objection.

The witness Perry was asked for the name of the person who introduced him to co-defendant Martinez. The Government objected to giving the name of the informant. The informant knew that Perry was a law enforcement officer. The officer, when asked whether or not the informant had made some contact with co-defendant Martinez concerning an introduction to the officer, responded that he had no independent knowledge of such transaction. The informant had been arrested for narcotics prior to meeting with the officer. There was a case pending against the informant at the time of the introduction of Martinez. The officer assumed that the informant was hoping for some assistance in his own case from the law enforcement officers if he would cooperate with them.

The informant was in a position to hear the conversation between police officer and Martinez on the date of the initial introduction and the informant, if he was identified could tell the Court whether or not the officer represented himself as a narcotics addict to Martinez.

Again defendant requested the name of the informant and again there was an objection

by the Government. Defendant stated his theory for requesting the identification of the informant; that is, the informant would state that Mr. Perry represented himself to Gonzales and co-conspirator Martinez as a user of narcotics and an addict, and because of this, induced Martinez and his co-defendant and co-conspirator Gonzales to sell narcotics to him. The Court refused to order disclosure of the informant by the officer.

In denying defendant's motion to compel disclosure of the informant, the Court stated:

> ". . . Mr. Martinez was here and he is going to be made available to you and we will have to see what happens. . . ."

Attorney Volney Brown appeared in Court and testified that he would instruct his client, Mr. Martinez, not to testify if called as a witness on behalf of the defendant Gonzales. The identity of the informant was never disclosed despite defendant's request.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals refused to consider two of appellant's three grounds on appeal (which two grounds go to five of the six counts on which appellant was convicted) because:

"We deem it unnecessary to consider the other errors claimed in the challenges to the five of the six counts. The appellant was found guilty on all six and sentenced on each to the same term, the sentences to be served concurrently. The validity of the sentence on the conspiracy count is sufficient to dispose of the case now before us. Benton v. Maryland, 395 U.S. 784, 791 (1969); Hirabayashi v. United States, 320 U.S. 81 (1943)."

It is true that the Court in Hirabayashi (an American of Japanese ancestry who was convicted and sentenced to concurrent three month sentences for violation of a special curfew directed against Japanese [The Supreme Court in 1943 traced the events surrounding Pearl Harbor and held that the Government could pass laws differentiating Japanese Americans from other Americans]) said that where sentences on each count run concurrently it is unnecessary to consider questions raised with respect to other counts if one count must be sustained.

This doctrine of "concurrent sentences" has been subsequently questioned by Federal Courts and did not prevent the Supreme Court in Benton, supra, from deciding appellant's grounds for appeal.

In Benton the petitioner was tried in a Maryland State Court for burglary and larceny. He was acquitted of larceny, but convicted of burglary and sentenced to 10 years in prison.

Because the grand and petit juries in petitioner's case had been selected under an invalid constitutional provision the case was remanded to the trial court and petitioner was re-indicted for larceny and burglary. Petitioner filed, on the ground of double jeopardy, a motion to dismiss the larceny count which the trial court denied. On retrial, he was found guilty of both offenses and concurrently sentenced to 15 years for burglary and five years for larceny.

On appeal, the State of Maryland suggested that the Court treat the concurrent sentence doctrine as a principal of judicial efficiency which permits judges to avoid decision of issues which have no appreciable impact on the right of any party. Maryland argued that the defendant should bear the burden of convincing the Appellate Court of the need to review all his concurrent sentences.

The Court felt that it need not apply the concurrent sentence doctrine as a rule of judicial convenience and raised the question (without resolving it) of whether the doctrine survives. Citing in part Sibron v. New York, 392 U.S. 40 (1968), the Court pointed out "the obvious fact that most criminal convictions do, in fact, entail adverse collateral legal consequences." The Court reviewed some possible adverse collateral effects of criminal convictions (even when there are concurrent sentences): (1) Some states consider prior felony convictions for the purpose of increasing sentences (see California Penal Code §788)

even if the convictions actually constituted only separate counts in a single indictment tried on the same day; (2) All the convictions might some day be put in issue at a future trial (California Evidence Code §§969, et seq.). "Although petitioner could explain that both convictions arose out of the same transaction, a jury might not be able to appreciate this subtlety."

The Court concluded in Benton that it could not say it lacked jurisdiction to decide petitioner's challenge to the larceny conviction even though he received concurrent sentences.

It is respectfully submitted that, in addition to the arguments against applying the concurrent sentence doctrine set forth above, there are more possible collateral effects from concurrent sentences such as: The date of release from prison being effected by the number of convictions and the question of whether the sentencing judge himself would have imposed the same sentence if there had been fewer convictions. For these reasons, the concurrent sentence doctrine should not have validity today.

On the one claim of error that the Court did consider, it concluded that a defendant may not seek shelter under the defense of entrapment claimed by another.

It is petitioner's theory, however, that the informant could testify to false representations made by officer Perry to co-defendant MARTINEZ or petitioner,

which false representations were either heard directly by the informant or later related to him by the officer.

Since the informant could testify to the statements of the undercover officer which statements could prove the theory of entrapment, and since the trial court refused to order such disclosure, defendant was precluded from asserting this defense.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT P. GORDON
MITCHELL W. EGERS

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 72-1110
ROBERT GONZALES, Defendant-Appellant.	)	

Appeal from the United States District Court for the Central District of California

Before: MERRILL, TRASK and GOODWIN, Circuit Judges

PER CURIAM:

The appellant, Gonzales, was convicted on six counts of an eleven count indictment which charged him with conspiracy with one Martinez to possess heroin with intent to distribute it, and to distribute heroin, 21 U.S.C. §846; and with possession with intent to distribute heroin and distribution of that drug, 21 U.S.C. §841(a)(1). He was sentenced to serve six concurrent terms of eight years each.

On this appeal, he asserts three claims of error. The first two claims are directed to five of the six counts but not to the conspiracy count. This count is unchallenged, except to the extent that the defense of entrapment may be available to him. For easons hereinafter stated, we hold that the defense of entrapment is not so available.

We deem it unnecessary to consider the other errors claimed in the challenges to five of the six counts. The appellant was found guilty on all six and sentenced on each to the same term, the sentences to be served concurrently. The validity of the sentence on the conspiracy count is sufficient to dispose of the case now before us. Benton v. Maryland, 395 U.S. 784, 791 (1969); Hirabayashi v. United States, 320 U.S. 81 (1943).

The entrapment which is claimed relates to transactions which occurred between the government informant and appellant's co-conspirator. Appellant admits the informant had no direct contact with him. It is well established in this circuit that a defendant may not seek shelter under the defense of entrapment claimed by another. United States v. Sanchez, 440 F. 2d 649 (9th Cir. 1971); United States v. Azadian, 436 F. 2d 81 (9th Cir. 1971); Carbajal-Portillo v. United States, 396 F. 2d 944 (9th Cir. 1968).

The judgment is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff and Appellee, vs. ROBERT GONZALES, Defendant and Appellant.	)	FILED JUN 28, 1972 CLERK No. 72-1110

O R D E R

Before: MERRILL, TRASK and GOODWIN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to deny the motion for stay of mandate.

The petition for rehearing and the motion for stay of mandate are both denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-40

ROBERT GONZALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1972. A petition for rehearing was denied on June 16, 1972. The petition for a writ of certiorari was filed on July 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case the trial court properly declined to order the disclosure of the identity of a confidential informant.

2. Whether the concurrent sentence doctrine was properly invoked in the circumstances of this case.

STATEMENT

Following a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted on six counts of an eleven-count indictment charging that he conspired to and did distribute heroin and possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846 (I. 1-3, 8-12; Tr. 202).[1] On November 15, 1971, he was sentenced to eight years' imprisonment on each count, the terms to run concurrently (Tr. 226). The court of appeals affirmed (Pet. App. A).

The evidence is not in dispute. Briefly, it showed that on July 14, 1971, Robert Perry, a state law enforcement officer acting as an undercover agent, gave $165 to one Nicholas Martinez, a codefendant who pleaded guilty, to purchase heroin from petitioner (Tr. 33, 35, 38-39).[2] Martinez, to whom officer Perry had been introduced by a confidential informant (Tr.

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[1] "I." refers to the indictment. "Tr." refers to the trial transcript, in two consecutively paginated volumes. Copies of both documents are being lodged herewith.

[2] Martinez declined to testify at the trial (Tr. 139-143).

117-121), added funds of his own to those supplied him, handed the total to petitioner as Perry watched from a few yards away, and received in exchange a balloon containing heroin which Martinez then delivered to the officer (Tr. 39-43). Thereafter, on July 21 and July 27, officer Perry purchased quantities of heroin from petitioner directly (Tr. 64-76, 79-87).

On August 4, 1971, after telephonically arranging with petitioner to buy additional heroin, officer Perry drove with Martinez to petitioner's residence and parked across the street (Tr. 87-89). Shortly thereafter petitioner, carrying a brown paper bag, arrived and brought Perry into the kitchen. There he removed from the paper bag five smaller bags containing 267 grams of heroin-containing substances (Tr. 89-92, 94-100). Stating that he would go and get his money, Perry left the house, procured $13,000 from his car, gave a prearranged signal to other law enforcement officers who had been watching the premises from points nearby, and started back towards the house (Tr. 92). When Perry was half way to the front door, the officers to whom the signal had been given rushed toward the dwelling, some into the front yard and some into the back (Tr. 93, 111, 167-168). Petitioner, who had been standing in the front doorway, upon seeing the officers, fled into the house, through the kitchen, and out the back door; he was arrested in the back yard. When Perry pursued pe-

titioner into the house, he saw the five bags of heroin lying on the kitchen floor (Tr. 93, 112, 167-169).

ARGUMENT

1. The trial court, following a hearing, denied petitioner's request to compel the government to disclose the identity of the confidential informant who introduced Perry to Martinez (Tr. 117-127). There is no merit to petitioner's contention that this ruling was error (Pet. 3, 9-10). The government has a right to preserve the anonymity of its confidential informants except on a showing by the defense of a need for disclosure that outweighs the government's interest in maintaining the confidentiality of the relationship. *Roviaro* v. *United States*, 353 U.S. 53; *Rugendorf* v. *United States*, 376 U.S. 528, 534-535; *United States* v. *Kelly*, 449 F. 2d 329, 330 (C.A. 9); *Firo* v. *United States*, 340 F. 2d 597, 598 (C.A. 5), certiorari denied, 381 U.S. 929. Here, unlike the situation in *Roviaro* v. *United States*, *supra*, the informant did not participate in any of the pertinent transactions; nor did the defense present any other valid reason for requiring disclosure. The sole reason for disclosure asserted at the hearing was the wholly speculative suggestion that the informant, if identified and subpoenaed, could possibly have testified that officer Perry, contrary to the latter's sworn denial (Tr. 124), had represented himself to Martinez as a user of heroin when they were introduced. Petitioner suggested that this testimony would have been

relevant to a possible defense of entrapment (Tr. 124-127). But such testimony even if forthcoming would have been pertinent only to a claim by Martinez that he had been entrapped; it would not have supported an entrapment defense by petitioner.[3] A defendant has no standing to assert that some other person was entrapped, even if the other person was an accomplice or co-conspirator. *United States* v. *Sanchez*, 440 F. 2d 649, 650 (C.A. 9); *United States* v. *Azadian*, 436 F. 2d 81, 82-83 (C.A. 9); *Carbajal-Portillo* v. *United States*, 396 F. 2d 944, 947-948 (C.A. 9). There was no evidence that petitioner was entrapped. Indeed, the uncontroverted evidence establish the absence of entrapment.

2. Petitioner argued in the court of appeals that two pairs of counts charging illegal possession with intent to distribute and illegal distribution (on two dates) constituted only two offenses, not four. Petioner also alleged that the heroin that was found by officer Perry in the kitchen during the chase preceding petitioner's arrest, and that underlay a separate possession count, was illegally seized.

These claims do not affect the validity of the conviction on the conspiracy charge, and the court of appeals properly invoked the concurrent sentence doctrine in declining to consider the arguments with respect to the five challenged counts. *Benton* v. *Maryland*, 395 U.S. 784, relied upon by petitioner, held that the imposition of concurrent sentences does not

[3] Petitioner was not present at the meeting between Perry, Martinez and the informer (Pet. 5).

constitute a jurisdictional bar to consideration of a challenge to one or more counts not necessary to sustain the sentence. The Court did not eliminate the concurrent sentence doctrine as a discretionary tool to be properly employed in the interest of judicial efficiency. And the courts of appeals have continued to employ the doctrine in this manner. *E.g.*, *United States ex rel. Epton* v. *Nenna*, 446 F.2 363, 366 (C.A. 2), certiorari denied, 404 U.S. 948; *United States* v. *Adcock*, 447 F. 2d 1337, 1339 (C.A. 2), certiorari denied, 404 U.S. 939; *United States* v. *Barsaloux*, 419 F. 2d 1299, 1300 (C.A. 5), certiorari denied, 397 U.S. 972; *United States* v. *Hood*, 442 F. 2d 737, 742 (C.A. 7), certiorari denied, 400 U.S. 820; *Tarvestad* v. *United States*, 418 F. 2d 1043, 1046 (C.A. 8), certiorari denied, 397 U.S. 935; *Jordan* v. *United States*, 416 F. 2d 338, 346 (C.A. 9), certiorari denied, 397 U.S. 920; *Schutz* v. *United States*, 432 F. 2d 25 (C.A. 10), certiorari denied, 401 U.S. 1002; cf. *United States* v. *Spears*, 449 F. 2d 946, 948-949 (C.A.D.C.); *United States* v. *McKenzie*, 414 F. 2d 808 (C.A. 3). Since the substantive offenses involved here were all similar in character and were committed within a brief period pursuant to a single conspiratoral plan of action, the court's decision to forego consideration of the disputed substantive counts was an appropriate exercise of its discretion.[4]

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[4] In any event petitioner's contentions with respect to the counts at issue are without merit. The contention that four counts charged only two offenses assumes that the offense of possessing heroin with intent to distribute it and that of dis-

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

SEPTEMBER 1972.

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tributing the same heroin are in substance identical crimes. This assumption is not warranted. See *Albrecht* v. *United States*, 237 U.S. 1, 11-12, involving the possession and sale of liquor. Moreover, since cumulative penalties were not imposed, there was no prejudice. There is also no merit to petitioner's claim that the heroin involved in one count was unlawfully seized. The heroin was in plain view when, in hot pursuit of a fleeing suspect, Perry saw what he had reason to believe was heroin lying on the floor of the kitchen. The seizure of the heroin, under these circumstances, was clearly proper. Cf. *Warden* v. *Hayden*, 387 U.S. 294, 298-300; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465.

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